when the principal is not due, but the interest is, a general payment is applied first to the interest, and the residue to the principal first to become due, so as to stop interest *pro tanto*, from the time of payment. But if neither principal nor interest is due, then the payment is applied to the extinguishment of principal and interest rateably: *Jencks* v. *Alexander*, 10 Paige 619. If there be several debts of the same degree, all carrying interest, a payment will be applied to extinguish the interest of all the debts, before reducing the principal of any one: *Steele* v. *Taylor*, 4 Dana 445, 450. And so it is presumed if there were two debts, one bearing interest and the other not, the law would direct the interest due to be discharged before the principal of either was reduced. This principle of applying a payment first to extinguish the interest, as the interest bears no interest, is clearly analogous to the applying it first to the payment of a non-interest-bearing debt, in preference to one that bears interest, and hence in carrying out the presumed intention of the creditor goes far to sustain the principle of the common law. This principle, it is now submitted, is so far in the ascendant that the time is not far distant when it will be universally recognised. A. D.

RECENT AMERICAN DECISIONS.

Court of Appeals of Kentucky.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* JERRY COLLINS.

Where an employee upon a railway is injured by the negligence of the engineer of the company, and is himself guilty only of such neglect and want of care, as would not have exposed him to the injury but for the gross neglect of the engineer, and when the engineer might with ordinary care have avoided the injury, he is not precluded from maintaining his action.

What is gross neglect in the engineer may be determined by the court, as a question of law, when there is no controversy in regard to the facts.

In regard to those acts of a corporation which require care, diligence, and judgment, and which it performs through the instrumentality of general superintending agents, the corporation itself is to be regarded as always present supervising the action of its agents.

The rule of law, that the master is not responsible to one of his servants, for an injury inflicted through the negligence of a fellow-servant, is not adopted, to the full extent of the English decisions, in the state of Kentucky. The rule is there

regarded as anomalous, inconsistent with principle, analogy, and public policy, and unsupported by any good or consistent reason.

In regard to all servants of the company acting in a subordinate sphere, the one class to another, and receiving injuries while in the performance of duties under the command of a superior, whose authority they had no right to disobey or disregard, it is the same precisely as if the injury were inflicted by the act of the company; and if there is any want of care and skill in the superior, such as his position and duty reasonably demand, the company are responsible.

In such cases there is no implied undertaking on the part of the servant to risk the consequences of the misconduct of the agent of the company under whose authority he acted, and through whose negligence he received the injury.

Servants so situated, in distinct grades of superiority and subordination, are not to be considered as "fellow-servants," or "in the same service;" but rather in the light of strangers to each other's duties and responsibilities; and the subordinate may recover of the company for any injury sustained by reason of the ordinary neglect of the superior.

But if the subordinate is himself guilty of any want of ordinary care, whereby he is more exposed to the injury, he cannot recover, unless the superior was guilty of wilful misconduct or gross neglect, but for which he might have avoided inflicting the injury, notwithstanding the negligence of the other party.

Where, therefore, an engineer, while upon his engine, ordered a common laborer to do some needed work under the engine, in fastening bolts or screws belonging to it; and such workman, while lying upon his back in the performance of the service, had both his legs cut off, by the movement of the engine forward and backward, through the gross neglect or wilful misconduct of such engineer, the company are responsible for the injury, notwithstanding there might have been some want of ordinary care on the part of the subordinate, contributing to some extent to the injury, but not necessitating it, except through the gross misconduct of the superior.

Per ROBERTSON, C. J.—We do not consider that the rule exempting the company from responsibility for injuries inflicted upon their servants, through the want of ordinary care in other servants of the company, extends beyond those who are strictly "fellow-servants" in the same grade of employment, and where one is not subject to the order or control of the others.

Beyond this the company is responsible for the consequences of the misconduct of superiors towards inferiors in its service, the same as towards strangers.

APPEAL from Warren Circuit Court.

The opinion of the court was delivered by

ROBERTSON, C. J.—This appeal presents, for the first time, to the appellate court of Kentucky a new and unsettled question, involving the legal liability of railroad companies for damages resulting to an inferior from the negligence of a superior employer while engaged in different spheres of employment in the common service of any such corporation.

The appellee, while employed by the Louisville and Nashville Railroad Company, as a common laborer, in loading and unloading its burthen-cars, engaged in carrying for its road cross-ties

and iron, was required, with a co-laborer of the same class, to assist its engineer in righting, in Bowling Green, Kentucky, a locomotive which seemed to be out of order.

And the steam being up, the front wheels jacked, the hind wheels unscotched, the engineer on top, and the appellee working, as ordered, beneath; the engine moved forward, and cut off one of the appellee's legs, and that motion being reversed by the engineer, the other leg also was cut off.

For that irreparable loss, dooming him to hopeless poverty and dependence, the appellee sued the appellant for tort, and recovered a judgment for $5000 damages, as assessed by the jury.

The appellant denies that its engineer was guilty of culpable negligence, and insists also that as he was competent and trustworthy, it is not responsible to his *co-employee* for his negligence, however gross.

The Circuit Court instructed the jury that, if they believed that the accident resulted from the *gross* negligence of the engineer, the appellant was liable for it in this action.

After full and careful consideration, we are satisfied that the engineer was guilty of some negligence.

The degree of it was a question of fact which, on such apparently conflicting testimony, the jury had the right to decide; and whatever deduction may be most logical and consistent, we are also satisfied that the circumstances, as detailed by all the witnesses, authorized the jury to find that his negligence was "*gross*." An elaborate analysis of all the facts would not, therefore, be either useful or pertinent in this opinion.

But the appellant assumes that the appellee's own fault contributed to the catastrophe—and he thereupon insists that the co-operation of even the gross negligence of the engineer will not sustain the action. The assumption is not sufficiently maintained, nor is the conclusion from it altogether unexceptionable or true.

The engineer does testify that he directed the appellee and his associate in the work to "block" the wheels, and says that such a precaution would have prevented the accident. But others, who heard all that was said, and saw all that was done on that occasion, do not corroborate, but, by strong implication, negative his statement of that fact, rather discredited by the incredible omission, and by his failure to see that danger, so imminent in his opinion, was not averted by a security so obvious to him and

so easy to them, and his credibility is also impaired by his interest and zeal, and his conduct in hiding himself, and abandoning his post in the appellant's service, almost immediately after the infliction of the injury on the appellee. And not only may we presume that the appellee, a young and unskilled laborer, was ignorant of the utility of scotching, but feel sure that the engineer either did not advise or direct it, or was guilty of gross negligence in placing him in so much peril under the engine without seeing that its stationary attitude was first secured by blocking, and also in using no means of keeping down the steam, or preventing its accumulation, although the appellee was kept under the locomotive more than an hour, the steam increasing and the wheels unscotched all the time.

But had the appellee been guilty of negligence, nevertheless the injury might have been avoided by the proper care of the engineer, and is therefore attributable to his gross negligence. In such a case both principle and preponderating authority seem to decide that such a remediable fault of the person injured should not exonerate the wrongdoer from legal liability for the damage which, without gross negligence, he could have prevented, and was as much bound by law to prevent in that as he would have been in any other case.

In running its locomotive and its passenger and burthen cars, a railway corporation is required by law to observe at least ordinary care, vigilance, and skill, so far as strangers may be affected by the employment of a motive power, so tremendous and destructive as unregulated, or carelessly or unskilfully regulated steam, and, as in every class of cases of bailment or trust, the requisite care is proportioned to the danger of neglect, and the difficulty of conservative management, ordinary care, in many classes of cases, might be ordinary neglect, and ordinary neglect might be gross neglect in steam operations on a railway.

In all those operations the invisible corporation, though never actually, is yet always constructively present, through its acting agents who represent it, and whose acts, within their representative spheres, are *its* acts. Had the appellee been a stranger, the appellant would therefore have been certainly suable and responsible in this action; and we cannot admit that the appellee's relation as an employee in its service, should exempt the corporation from that general liability, as it might perhaps do by the applica-

tion of a recent rule adjudged in England, with some exceptions, and echoed with still more exceptions by a few American courts. But this anomalous rule, even as sometimes qualified, is, in our opinion, inconsistent with principle, analogy, and public policy, and is unsupported by any good or consistent reason.

In the use and control of the engine, the engineer is the chief and governing agent of the corporation, and all his associates *in that employment* are employees in "a common service." Neither of these subordinates under his control is, *as between themselves*, an agent of the railway company, and therefore *it* is not responsible for any damage by one of them to another while in its service. And so far the British rule has foundation in both reason and analogy; but beyond this it is baseless of any other support than a falsely assumed public policy or implied contract. In the employment and control of his subordinates, the engineer acts as the representative agent of the common superior—the corporation. They have no authority to control or resist him in his allotted sphere of service. And why, then, should the law imply a contract to trust him alone, and never look to the corporation, as his employer and constituent, for indemnity for damage resulting from his wilful wrongs, or grossly negligent omissions? When they engaged to serve under him perhaps they knew nothing of his trustworthiness or his credit. But they knew that they would serve a corporation, and probably faith in *its* responsibility and protection induced them to venture into its service. And this faith may be presumed to include an assurance of safety as well as of pay.

Perhaps, if they had understood that the corporation would not be responsible for the conduct of its engineer, they would never have risked such service under him. The contract implied by law would therefore rather seem to be that the subordinates should look to the corporation, and not to its agent alone, for indemnity for loss arising to them from his unskilfulness or culpable negligence. Nor can we perceive how public policy could be subserved by the irresponsibility of the corporation in such a case. Such exemption, if known, might possibly stimulate the subordinates to a more vigilant observance of the engineer's conduct. But why should they be left to depend on that which could be of little if any avail to prevent the unskilfulness or negligence of a superior above their dictation or control?

In undertaking the perilous service they might be presumed to risk the hazards necessarily incident to their employment, and as they could not expect infallibility in the management of the locomotive and its running train, and as they knew that the most faithful and skilful managers may occasionally lapse into common blunders and *ordinary* negligences, the law might imply an agreement to risk their possible occurrence. But the corporation being under an implied obligation to provide sound and safe cars and engines, and a competent and faithful engineer, his subordinates cannot reasonably be presumed to expect or to hazard his gross negligence, which borders on fraud and crime.

And it seems to us, therefore, that while the corporation may not be responsible to them for his ordinary negligence, both justice and policy require that it should be held liable for his gross negligence, as its chief and controlling agent in the management of its running train. Assurance of protection to this extent, not only appears just and reasonable, but, by inspiring more confidence, would enable the corporation to obtain and keep better employees, and at cheaper rates. This doctrine, therefore, instead of its converse, seems to be suggested by reason and commended by policy.

But in this respect employees, like the appellee, in a distinct and altogether different department of service, stand in an essentially different category.

In their employment having nothing to do with the cars or the running of them, they, like the corporation's mere woodchoppers, are comparative strangers to the engineer and his running operations, and seem to be entitled to all the security of strangers. They may be presumed to know no more than strangers about the skill or care of the engineer, nor have they any more control over him, or connection with his running arrangements or operations. They are therefore not, in the essential sense of contradistinctive classification, "*in the same service*" with the engineer and his running co-operators, who act in a different sphere and constitute a distinct class. Consequently neither of the assumed reasons for the British rule as to employees "in the *same* service" can be in any way consistently applied as between the engineer and such common laborers as the appellee. And the apparent extension of the rule to them may be deemed inadvertent, or not carefully and logically considered with rational discrimina-

tion and precision. We therefore can neither feel the *rationale*, nor acknowledge the authority of the crude and self-contradictory decisions, or loose and incongruous *dicta*, referred to on that subject. But to harmonize the law, we must recognise a more congenial principle of normal vitality, and adjudge, as we now do, that the appellee, in his humble and isolated employment, should be treated as a stranger to the engine as a motive power, and, if without fault himself, might, like other strangers, recover from the railway corporation for a loss arising from the ordinary negligence of its engineer. But as the jury might possibly have found that he himself had been negligent, the Circuit Court was right in requiring proof of gross negligence by the engineer, which in that contingency would have been necessary to the liability of the appellant.

The only consistent or maintainable principle of the corporation's responsibility is that of agency: "*Qui facit per alium, facit per se.*" It is therefore responsible for the negligence or unskilfulness of its engineer, as its controlling agent in the management of its locomotives and running cars; and that responsibility is graduated by the classes of persons injured by the engineer's neglect or want of skill. As to strangers, ordinary negligence is sufficient; as to subordinate employees, associated with the engineer in conducting the cars, the negligence must be gross; but as to employees in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient. Among common laborers constituting a distinct class, all standing on the same platform of equality and power, and engaged in a merely incidental but independent service, no one of them, *as between himself and his co-equals*, is the corporation's agent; and therefore *it* is not, on the principle of agency or otherwise, responsible for damage to one of them resulting from the act or omission of another of them, although each of the company's employees would be its agent as to entire strangers to it.

This is the only doctrine we can recognise as consistent with the enlightened and homogeneous jurisprudence of this clearer day of its ripening maturity. And looking through the mist of the adjudged cases and elementary *dicta*, we can see no other fundamental principle which can mould them into a consistent or abiding form.

That principle is the only safe clue to lead the bewildered explorer to the light which shows the sure way of right, and proves the true doctrine of American law.

We feel authorized to conclude that the appellant was legally liable to the appellee for the injury done to him by the gross negligence of its engineer; that the court, on the trial, gave to the jury the true and only true law, and that the verdict was authorized by both the law and the facts: and we would overstep the judicial line by interfering with such a verdict, in such a case, on the ground of alleged exorbitance, indicating neither passion, partiality, nor prejudice.

Wherefore the judgment is affirmed.

We have presented a very extended syllabus of the foregoing case, at the beginning, embracing all the points upon which the opinion of the court is given, without regard to their being directly and necessarily involved in the decision of the cause. And notwithstanding the avowed willingness of the learned judge to disregard the general current of authority upon the point, and the apparent spirit of freedom with which he deals with the decisions in other states and countries, notwithstanding all this, and more that might fairly be said as to the fearlessness and disregard of self with which the opinion abounds, which is not altogether common in dealing with the opinions of such men as Lord ABINGER and Ch. J. SHAW, and a host of others scarcely less eminent in their field of service; notwithstanding all this, which has rather surprised us, we must confess at the same time that we could not but regard it as a refreshing exception to the proverbial subserviency of opinion to precedent and analogy, and we have felt compelled to the conclusion that the opinion is altogether entirely sound in its principles, and maintained with very uncommon ability, in its logic as well as its illustrations, both of which seem altogether unexceptionable.

But we must warn those members of the profession, who are not altogether aware of the extent of the decisions in the opposite direction, that they embrace a very large number of the best-considered English cases; and an equal number, almost, in the American states, including all, as far as we know, with the exception of Ohio and Georgia, and now Kentucky. And the decisions in these latter states are all attempted to be placed upon peculiar grounds, thereby virtually confessing the soundness of the general rule, that one cannot recover of his employer for an injury inflicted through the want of care in a fellow-servant employed in the same department of the master's business, and under the same general control. This is declared by the learned judge in the principal case.

The opinion in the principal case would have been far more satisfactory, if the learned judge could have devoted more labor and time to the matter. If a careful review of the preceding cases, with the reasoning of the judges, could have been presented in the very carefully prepared opinion, it could not have failed to be more valuable. Discussion of a broad principle is much less expensive to the author and far less satisfactory, as a general thing, to the profession, than a careful review of the cases.

We should not expect our readers

would here listen to such an attempt on our part, since it must occupy considerable space, and would be merely professional, instead of being clothed with the weight of judicial authority. We shall, therefore, not attempt it, having many years since presented our own views to the public upon this and the analogous questions: Redf. on Railways 384–390.

But we have noticed with gratification more for the justice of the view than because we had before contended for the same, that the learned judge declares most unequivocally, in the principal case, that the corporation is to be regarded as constructively present in all acts performed by its general agents, within the scope of their authority, *i. e.*, within the range of their ordinary employment. The consequences of mistake or misapprehension, upon this point, have led many courts into conclusions greatly at variance with the common instincts of reason and humanity, and have tended to interpose an unwarrantable shield between the conduct of railway employees and the just responsibility of the company. We trust that the reasonableness and justice of this construction will, at no distant day, induce its universal adoption. See Redfield on Railways, § 69, pl. 6, 7, 8, 9, and notes, and cases cited.

In regard to the leading point involved in the principal case, how far a servant is entitled to recover of the master for an injury inflicted by the negligence or want of skill of a fellow-servant, the doctrine of exemption was first established in the Court of Exchequer, in *Priestley* v. *Fowler*, 3 M. & W. 1, which was decided at Michaelmas Term 1837. The same rule was adopted in this country by the Supreme Judicial Court of Massachusetts, in *Farwell* v. *The Boston and Worcester Railroad Corporation*, 4 Met. 49, at the March Term 1842, supported by one of the ablest and most unexceptionable opinions ever delivered from the American Bench; an opinion which has commanded the admiration of the entire profession, both Bench and Bar, in England as well as in America; and which has been more extensively adopted and formally incorporated into the opinions of the English courts, than, perhaps, any other opinion of an American judge. This opinion was in fact preceded by that of *Murray* v. *The South Carolina Railway Co.*, 1 McMullan 385, in the same direction; but the former has been regarded as the leading American case.

These leading opinions, in the different countries, have been followed by a multitude of cases reaching down to the present time, most of them occupied in the discussion of what were claimed to be exceptional cases. In England we may, among a multitude of others, refer to *Hutchinson* v. *York, Newcastle, and Berwick Railway*, 5 Exch. 343; *Wigmore* v. *Jay*, Id. 354; *Skip* v. *Eastern Counties Railway*, 24 Eng. L. & Eq. R. 396; *Degg* v. *Midland Railway*, 1 Hurlst. & N. 773; *Tarrant* v. *Webb*, 37 Eng. L. & Eq. R. 281; *Mellors* v. *Shaw*, 7 Jur. N. S. 845; *Seymour* v. *Maddox*, 16 Q. B. 326; *Ormond* v. *Holland*, 1 El., Bl. & Ellis 102.

In the American states the decisions are considerably numerous where the general principle of the foregoing decisions has been acted upon, or recognised, but we shall not refer to more than will be requisite to show how far the rule prevails in different states. It is adopted in *Brown* v. *Maxwell*, 6 Hill (N. Y.) 592; *Coon* v. *Syracuse and Utica Railway*, 6 Barb. 231; s. c. 1 Selden 492, and numerous other New York cases, cited in Redfield on Railways 386–389. See also *Honner* v. *The Illinois Central Railway*, 15 Ill. Rep. 550; *Ryan* v. *Cumberland Valley Railway*, 23 Penna. St. 384; *Madison and Indianapolis Railway* v. *Bacon*, 6 Porter (Ind.) R. 205; *Hawley* v. *Baltimore*

and Ohio Railway, 6 Am. Law Reg. 352; *Frazier* v. *The Pennsylvania Railway Co.*, 38 Penna. St. 104; *Wright* v. *New York Central Railway*, 28 Barb. 80; *Carle* v. *B. & P. Canal and Railway Co.*, 43 Maine 269; *Noyes* v. *Smith*, 28 Vt. Rep. 59; *Indianapolis Railway* v. *Love*, 10 Indiana R. 554; *Same* v. *Klein*, 11 Id. 38. The general principle is adopted in all the other states where the question has arisen; for although in Ohio, in the cases of *Little Miami Railway Co.* v. *Stevens*, 20 Ohio 415, and *C. C. & C. Railroad Co.* v. *Keary*, 3 Ohio, N. S. 201, the companies are held responsible for the injury, the decisions are placed upon the ground, that the persons injured were in subordinate positions. And in *Scudder* v. *Woodbridge*, 1 Kelly 195, it was held the rule did not excuse the master for injury thus caused to slaves, mainly upon the same ground of their dependent and subordinate position. And the principal case is placed upon the same ground. And in the more recent case of *Whalan* v. *Mad R. and Lake Erie Railway Co.*, 8 Ohio, N. S. 249, it was held that where one of the trackmen was injured by the neglect of the fireman upon one of the trains, there was no such subordination of position, as to take the case out of the general rule, and the case was decided in favor of the company; thus maintaining the soundness of the general rule in that state by its latest decision.

It is safe, therefore, to state, that all the cases, both English and American, maintain the general rule to the extent of those who are strictly "fellow-servants" in the same department of service. And where this is not the fact, but the employees are so far removed from each other, that the one is bound to obey the directions of the other, so that the superior may be fairly regarded as representing the master, we think it more consonant with reason and justice to treat the matter as not coming within the principle of the rule. This is so declared by GARDINER, J., in *Coon* v. *Syracuse and Utica Railroad Co.*, 1 Selden 492. But this qualification is denied by SHAW, C. J., in *Farwell* v. *Boston and Worcester Railway*, 4 Met. 49, 60, 61, unless the departments of service are so far independent as to have no privity with each other, not being under the control of a common master. And it was so decided in *Gillshannon* v. *Stony Brook Railway Co.*, 10 Cush. 228. And it seems finally to be settled upon authority, that it is sufficient to bring the case within the rule, that the servants are employed in the same common service, as in running a railway, or working a mine: *Wright* v. *New York Central Railway*, 25 N. Y. Ct. App. 562, 564, by ALLEN, J. The question is whether they are under the same general control: *Abraham* v. *Reynolds*, 5 H. & N. 142; *Hard, Admr.*, v. *Vermont and Canada Railroad*, 32 Vt. R. 473.

And there is no question, that the master is responsible for any want of skill or care, in employing competent and trustworthy servants, and in sufficient numbers; and in furnishing safe and suitable machinery for the work in hand, unless the servants knowing, or having the means of knowing, of the deficiency in furnishing proper help or machinery, consent to continue in the employment. And the neglect or want of skill of the master's general agent employed in procuring help and machinery, is the act of the master: *Hard* v. *Vermont and Canada Railway Co.*, *sup.*; *Wiggett* v. *Fox*, 36 Eng. L. & Eq. R. 486; *Noyes* v. *Smith*, 28 Vt. Rep. 59. Indeed this exception is recognised in most of the preceding cases. Many of the late cases upon the question have turned upon this point, the general rule having been regarded as settled beyond question for many years.

We are not disposed to question the

extent of the exceptions to the general rule; and possibly any greater extension in that direction might essentially impair the general benefit to be derived from it. But we would be content to treat all the subordinates, who were under the control of a superior, as entitled to hold such superior, as representing the master, and the master as responsible for his incompetency or misconduct. We should regard this as a more salutary rule, upon the whole, than the present one, but the general current of authority seems greatly in the opposite direction. I. F. R.

Supreme Court of Michigan.

MARAMUS AMPERSE ET AL. *v.* AUGUSTUS D. BURDENO.[1]

Under statutes giving power to a married woman to enjoy, contract, sell, transfer, convey, devise, or bequeath her property, in the same manner and with like effect as if she were unmarried, a husband can convey real estate to his wife by deed directly, without the intervention of a trustee.

The opinion of the court was delivered by

CAMPBELL, J.—Burdeno sued plaintiffs in error in trespass for alleged wrongful acts upon his freehold, being land covered by water. The suit was for treble damages to Burdeno, as proprietor of the land, the statutory action not lying for mere possession: *Achey* v. *Hull*, 7 Mich. R. 423. Defendants offered to show that Burdeno had, in September 1861, conveyed the property by deed to his wife, Victoria Burdeno. This deed was objected to as invalid, because of the relation of the parties; and the court below sustained the objection, and rejected the evidence.

The question is presented, therefore, whether, as our laws now stand, a deed can be made by a husband to his wife. To determine this question, we must see how their relations were governed, in this respect, before our present system was introduced.

The effect of marriage was to produce what is called in the law-books *unity of person;* the husband and wife being but one person in the law: Co. Litt. 112 a; 1 Bl. Comm. 442. The wife, by her coverture, ceased to have control of her actions or her property, which became subject to the control of her husband, who alone was entitled, during the marriage, to enjoy the possession of her lands, and who became owner of her goods and might sue for her demands. The wife could neither possess nor manage

[1] We are indebted for this opinion to the courtesy of Hon. J. V. CAMPBELL, of the Supreme Court of Michigan.—EDS. AM. LAW REG.